IN THE

Supreme Court of the United States

OCTOBER, 1978

No. 78-179

ROBERT L. JOHNSON, JR., *et al.*,
Petitioners,

v.

RYDER TRUCK LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

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OPINIONS BELOW

The findings, conclusions and opinion of the District Court are unofficially reported at 10 [CCH] EPD ¶ 10,535; they are reprinted in the Appendix to the Petition, at pp. 26a-71a. The District Court's judgment is unofficially reported at 11 [CCH] EPD ¶ 10,692; it is reprinted at pp. 15a-25a of the Petition's Appendix. The April 1, 1977 opinion of the Court of Appeals (Pet., at 13a-14a) is reported at 555 F.2d 1181, while its May 2, 1978 opinion on rehearing (Pet., at 1a-12a) is reported at 575 F.2d 471.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Respondent Unions restate the question presented by this case in the following terms:

Does a bona fide seniority system, applying equally to all races and ethnic groups, violate Section 1981 of Title 42, United States Code, because it does not afford retroactive seniority credits to victims of past discrimination in hiring?

STATUTORY PROVISIONS INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-2(h), and 42 U.S.C. § 1981, are set forth in the Petition, at 3. In addition, 42 U.S.C. § 1988 provides in pertinent part:

> "The jurisdiction in civil . . . matters, conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . ."

STATEMENT

This action under Title VII and 42 U.S.C. § 1981 was filed on January 5, 1973 by the Petitioners against their employer, Ryder Truck Lines, Teamsters Local 71 and the International Brotherhood of Teamsters. The complaint alleged a variety of discriminatory actions, including hiring discrimination by Ryder, and the maintenance of a seniority system prior to July, 1973, which had the effect of perpetuating discriminatory hiring policies. The case was certified as a class action; it was tried in August,

1975. On November 18, 1975, the United States District Court for the Western District of North Carolina found and concluded, *inter alia*, that Ryder had pursued a policy of refusing to hire over-the-road drivers from the ranks of black applicants for employment and black employees working in local cartage operations. Also, the seniority system in force when the suit was filed was held discriminatory.

The District Court's findings indicated that the seniority provisions of the City Cartage and Over-the-Road Supplements to the National Master Freight Agreement, which were effective prior to July 1, 1973, had the effect of perpetuating Ryder's discriminatory hiring policies so far as they did not permit transferees from city cartage to carry their terminal seniority with them upon moving to road jobs. (Pet., at 35a, 37a) "[T]he restrictive seniority provisions in the pertinent agreements were [held] violative of Title VII and 42 U.S.C. § 1981." (Pet., at 36a) The District Court further noted that, effective July 1, 1973, the seniority system was changed to permit transferees between city and road jobs to carry with them their full terminal seniority. (Pet., at 37a-38a) The plaintiffs and class members who transferred to road jobs enjoyed the benefit of these contract changes. Their seniority status was not affected by the Fourth Circuit Court of Appeals' decision on the question presented by the Petition.

The District Court awarded backpay to five employees it found to have been discriminatorily excluded from road jobs by Ryder at hire, and inhibited from transferring by their inability to carry over accrued terminal seniority under the pre-1973 collective bargaining agreements. On April 1, 1977, the Court of Appeals affirmed per curiam the District Court's judgment. (Pet., at 13a) Ryder's petition for rehearing was first denied and then granted

after this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (hereinafter *T.I.M.E.-D.C.*). On rehearing, the Court of Appeals remanded for further consideration of the five employees' claims. (Pet., at 7a)

The Fourth Circuit panel unanimously concluded that *T.I.M.E.-D.C.* required reversal of that portion of the District Court's decision holding that the pre-1973 seniority system violated Title VII because it perpetuated past discrimination. In addition, it held that a facially neutral seniority system, "bona fide" within the meaning of Section 703(h), did not violate 42 U.S.C. § 1981. Under the pre-1973 contracts, white as well as black employees were required to yield their accrued seniority when transferring to road jobs. "Consequently, § 1981 does not afford the black employees relief, because the statute confers on black persons only the same rights possessed by white persons." (Pet., at 4a) Two members of the Court concluded that 42 U.S.C. § 1988, which "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts,'" required that the protections for bona fide seniority systems contained in Section 703(h) be taken into account in applying Section 1981 to claims alleging seniority discrimination. Circuit Judge Winter concurred in the holding that Section 1981 does not outlaw bona fide seniority systems.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT AND CONFORMS TO THIS COURT'S PRECEDENTS

This case presents the same issue under 42 U.S.C. § 1981 which this Court decided under Title VII in *T.I.M.E.-D.C.* There, as here, it was contended that a

facially neutral seniority system, applying equally to all races and ethnic groups, perpetuated past hiring discrimination because it did not permit seniority to be transferred across departmental lines. Like the all but identical seniority provisions considered in *T.I.M.E.-D.C.*, the vice of the pre-1973 seniority system involved in this case was said to be its tendency to "lock" minorities into city cartage jobs. But "to the extent that it 'locks' employees into non-line driver jobs, it does for all. . . ." 431 U.S. at 355-56.

The record is barren of any suggestion that the pre-1973 contracts were negotiated or maintained for any illegal purpose. Thus the sole question is whether their failure to extend retroactive seniority to victims of past discrimination amounts to a violation of Section 1981.

Based on the equal application of the pre-1973 contracts to both black and white city cartage drivers, the Court of Appeals concluded that "§ 1981 does not afford the black employees relief, because this statute confers on black persons only the same rights possessed by white persons." (Pet., at 4a) The Court acknowledged that each black incumbent employed prior to 1965 had a cause of action under Section 1981 for the hiring discrimination perpetrated against him. It noted, however, that these hiring claims were barred by North Carolina's three-year statute of limitations applicable to such claims. (Pet., at 4a, 8a); *Johnson* v. *REA*, 421 U.S. 454, 462 (1974). This holding is undoubtedly correct. As this Court stated in *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 758 (1976), "the underlying legal wrong . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. . . ." Here the hiring discrimination against the five employees affected by the Court of Appeals' decision on reconsideration occurred between 1950 and 1957, when two were hired by Ryder (2 JA 217-18, 239) and three were hired by another firm

later acquired by Ryder (2 JA 183, 262, 319). These ancient acts were "unfortunate event[s] in history which . . . [have] no present legal consequences." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977).

Evans involved a Title VII claim, in which a seniority system was alleged to have continued the effects of a discriminatory no-marriage rule, thereby preserving the discriminatee's otherwise time-barred claim. This "continuing violation" theory was rejected. Although *Evans* is not dispositive of this case, 431 U.S. at 558 n.10, it is significant to the extent this Court recognized that time-barred events frequently affect the calculation of seniority. *Id.* at 560. This is equally true in Section 1981 cases. See *Griffin* v. *Pacific Maritime Ass'n.*, 478 F.2d 1118, 1119-20 (9th Cir.), cert. denied, 414 U.S. 859 (1973); *Chatman* v. *United States Steel Corp.*, 425 F. Supp. 753, 761 (N.D. Calif. 1977). Statutes of limitation reflect an interest in prohibiting the prosecution of stale claims, an interest to be given effect in cases arising under Section 1981. *Johnson* v. *REA*, *supra*, 421 U.S. 454; 42 U.S.C. § 1988. This interest is defeated by regarding acts of hiring discrimination as continuing indefinitely, so long as they affect calculations of seniority credit under a neutral seniority system. That the Fourth Circuit declined to view the individual hiring claims involved here as continuing over approximately two decades surely suggests no conflict with this Court's decision in *Johnson*.

It is not apparent why hiring claims asserted by discriminatees employed in less desirable classifications allegedly continue by operation of a neutral seniority system, while claims of persons initially rejected for any job but hired later with less seniority than they might have had but for the discrimination, do not continue. Not only is the present seniority effect given to past acts of hiring discrimination the same, but, "if anything, the

latter group is more disadvantaged. . . ." *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. at 355. The same observation can be made with respect to employees discriminatorily discharged or laid off and later rehired. E.g., *United Air Lines, Inc.* v. *Evans*, *supra*, 431 U.S. 533; *Griffin* v. *Pacific Maritime Ass'n.*, *supra*, 478 F.2d 1118. Certainly the distinction between claims does not lie in the nature of a departmental seniority system, for there is nothing inherently discriminatory about a departmental seniority system. *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. 324. Nor is there any distinction in terms of limitations policy. The accrual of a hiring claim is at least as evident to an employee as a rejected applicant, and the one has slept on his Section 1981 rights no less than the other. *Johnson* v. *REA*, *supra*, 421 U.S. at 466.

Contrary to the Petitioners' assertion (Pet., at 7), the lower Court's decision does not conflict with this Court's conclusion in *Johnson* "that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of . . . Title VII. . . ." *Id.* Like Congress,[1] this Court considered the two statutes in a procedural and remedial context. *Id.* at 460. Other than to mention that Title VII and Section 1981 are "co-extensive" and that they "augment each other and are not mutually exclusive," 421 U.S. at 459, *Johnson* did not consider substantive prohibitions against particular acts of discrimination. Earlier this Court observed that "legislative enactments

[1] Little more can be gleaned from the legislative history of Title VII's 1972 amendments than "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). Congress was concerned that the short statutes of limitations, complex procedural prerequisites and coverage limitations in Title VII required the preservation of multiple remedies. *Johnson* v. *REA*, *supra*, 421 U.S. at 460, 471.

in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47. As the lower Court found, this Court nowhere has suggested that, as between Title VII and Section 1981, "Congress intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination." (Pet., at 6a-7a)

The Petitioners' assertion (Pet., at 10-11) that the decision below is inconsistent with this Court's constitutional decisions in school desegregation, voting and racial convenant cases overlooks fundamental differences between employment and other types of discrimination cases. The school desegregation cases are based on one overriding concept: "Separate educational facilities are inherently unequal. . . ." *Brown* v. *Bd. of Educ.,* 347 U.S. 483, 495 (1954). "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green* v. *County School Bd.,* 391 U.S. 430, 439 (1968).

"Freedom-of-choice" and other desegregation plans disapproved by this Court were not themselves held violative of the fourteenth amendment as perpetuating past discrimination. *Id.* at 439. Instead, they were found insufficient to accomplish desegregation *now. Id.* at 40. In short, the school desegregation cases are concerned with the adequacy of remedial measures formulated by school boards to comply with their affirmative duty under the fourteenth amendment " 'to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' " *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971).

These principles cannot be incorporated wholesale into the private employment sector. Neither Title VII nor

Section 1981 impose an affirmative duty on employers and labor organizations to construct a "unitary" employment system.[2] *T.I.M.E.-D.C.* v. *United States, supra,* 431 U.S. at 353. Unlike the school desegregation cases, which are concerned with remedies alone, this case turns on whether a racially neutral seniority system is itself discriminatory because it does not extend retroactive seniority credits to victims of past hiring discrimination. Here the hiring violations are time-barred and have no present legal significance, unless the failure to remedy them can be said to constitute a present violation. This Court has never intimated that the nondiscrimination obligation mandates affirmative action of this sort. School and employment discrimination cases cannot be equated.[3]

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[2] The duty of a union certified as an exclusive bargaining agent to represent unit employees fairly is "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . ." *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192, 202 (1944); see also *Syres* v. *Oil Workers, Local 23,* 350 U.S. 892 (1955). Yet this fair representation duty is not violated by maintenance of a neutral seniority system, even though that system may perpetuate the effects of past discrimination in hiring. *Whitfield* v. *United Steelworkers,* 263 F.2d 546 (5th Cir. 1958), cert. denied, 360 U.S. 902 (1959). The fact that the fair representation doctrine rests on equal protection underpinnings weighs heavily against the Petitioners' assertion that the lower Court's decision conflicts with half a century of constitutional decisions because the substantive prohibitions of Section 1981 are at least as broad as the fourteenth amendment. (Pet., at 10-11)

[3] *Lane* v. *Wilson,* 307 U.S. 268 (1939), in which a state first refused to permit blacks to register to vote and then, in effect, closed out the voting lists to all prospective registrants, is even wider of the mark. The state's conduct there more nearly can be analogized to a seniority system which is negotiated and maintained for express discriminatory purposes. See *T.I.M.E.-D.C.* v. *United States, supra,* 431 U.S. at 356.

II.

THERE IS NO CONFLICT OF DECISION

Minor differences of principle are apparent in the decisions of the several Courts of Appeal that have applied Section 1981 to employment discrimination cases. But these differences cannot fairly be described as conflicts of decision. At the outset, it should be noted that this Court has vacated and remanded cases brought under Section 1981 for reconsideration in light of *T.I.M.E.-D.C.*[4] In view of this Court's action, it is highly questionable whether Section 1981 cases decided before *T.I.M.E.-D.C.*[5] by Circuit Courts that have not yet reconsidered the issue necessarily represent the state of the law within these Circuits. Cf. *United States* v. *East Texas Motor Freight System, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977). The correctness of this view is indicated by the Sixth Circuit's experience. *Afro American Patrolmens League* v. *Duck*, *supra*, 503 F.2d 294 and *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974), cited in the Petition, at 9, were followed by *Alexander* v. *Aero Lodge No. 735, IAM*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 56 L.Ed.2d 787 (1978). Although the *Alexander* case was brought under both Title VII and Section 1981, the Sixth Circuit Court of Appeals reversed on the "seniority perpetuation" issue in light of *T.I.M.E.-D.C.*[6]

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[4] *Western Gillette, Inc.* v. *Sabala*, 431 U.S. 951 (1977); *Detroit Edison Co.* v. *EEOC, et al.*, 431 U.S. 951 (1977).

[5] E.g., *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294 (6th Cir. 1974); *Macklin* v. *Spector Freight Systems*, 478 F.2d 979 (D.C. Cir. 1973).

[6] There was no discussion of whether the bona fide seniority system in *Alexander* violated Section 1981. But the Sixth Circuit directed the District Court to "consider whether, absent consideration of the effects of the seniority system," the proof had established a " 'regular procedure or policy' " of discrimination. 565 F.2d at 1383.

No Circuit has held that Title VII, § 703(h) impliedly repealed Section 1981. In *Chance* v. *Board of Examiners*, 534 F.2d 993, modified on other grounds, 534 F.2d 1007 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977), the Second Circuit Court of Appeals declined to condemn as violative of Section 1981 a seniority system that withstood scrutiny under Title VII. The alternative grounds for its holding were that Title VII, § 703(h) either impliedly repealed "any possible contrary construction of § 1981," or furnished "a statement of guiding legal principles. . . ." *Id.* at 998. The latter ground enjoys wide acceptance among the lower Courts, which properly have interpreted Section 1981 to avoid substantive conflicts with Title VII. *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); *Waters* v. *Wisconsin Steel Works*, *supra*, 502 F.2d at 1320 n.4; accord, *Watkins* v. *United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).[7]

Thus the several Courts of Appeal have followed closely parallel avenues in reaching the same result, that is, Section 1981 does not outlaw bona fide seniority systems. But this fact falls far short of establishing a conflict in decision warranting exercise of this Court's certiorari authority.

The Court also stated its agreement with the holding of *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976).

[7] In *Watkins*, while suggesting that the substantive standards under Title VII and Section 1981 were the same as to employment issues dealt with by both statutes, the Fifth Circuit Court of Appeals rejected a challenge to a bona fide seniority system under Section 1981 because the proof did not establish acts of hiring discrimination against specific individuals allegedly perpetuated by the seniority system. See also *United States* v. *East Texas Motor Freight System, Inc.*, *supra*, 564 F.2d at 185, where the Court of Appeals intimated that the principles of *T.I.M.E.-D.C.* also applied to Section 1981 claims.

The Third Circuit Court of Appeals' decision in *Bolden* v. *Pennsylvania State Police*, 17 FEP Cases 687 (8th Cir. 1978), does not detract from our conclusion. There an intervenor attempted to obtain, *pendente lite*, modification of a consent decree's remedial provisions, to which it had agreed, on the ground of precedential evolution. Noting that the intervenor shouldered a particularly heavy burden, the Third Circuit denied relief. Due to the procedural context of the case, the issue was cast in terms of remedy and not violation: Whether *T.I.M.E.-D.C.* and its progeny "have made the elimination of seniority as a criterion for promotion illegal." *Id.* at 693. The Court indicated that it could not impute to Congress an "intention to circumscribe the remedial authority of the federal courts under §§ 1981, 1983, 1985 and 1988." *Id.* It also emphasized the "distinction, when relief is sought under Title VII, between violations of § 703(h) and remedies under § 706(g)." *Id.* Clearly *Bolden* did not reach the issue in the instant case.

III.

COUNTY OF LOS ANGELES v. *DAVIS*, NO. 77-1553, PRESENTS A DIFFERENT LEGAL QUESTION

In *County of Los Angeles* v. *Davis*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (U.S., June 19, 1978) (No. 77-1553), the Ninth Circuit Court of Appeals held that use of an employment test violated Section 1981 based on a showing that the test screened out disproportionate numbers of minority persons, thus establishing a prima facie case of discrimination which was not rebutted due to the employer's failure to demonstrate the test's validity. A divided panel held that no proof of an actual intent to discriminate was required under Section 1981 as it is in equal protection cases. *Washington* v. *Davis*, 426 U.S. 229 (1976). In the

panel's view, Title VII's impact discrimination standard, as outlined in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is applicable to Section 1981 claims.

"Impact discrimination" is significantly different than the "past discrimination perpetuated" theory on which the instant case was tried and appealed. Disproportionate impact and job relatedness are critical issues in "impact discrimination" cases, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), while "past discrimination perpetuated" theories turn on a failure to extend a remedy for earlier acts of discrimination. See *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. at 348. These differences are underscored by the fact that *County of Los Angeles* does not involve the statute of limitations or seniority issues presented by the question in this case. Whether a violation of Section 1981 can be made out without proof of an actual intent to discriminate is simply not a question here.

Even if we are wrong in this regard, it is clear that this Court's decision in *County of Los Angeles* will not affect the result reached by the Court below. A holding that intentional discrimination is a critical element of a Section 1981 claim will privilege bona fide seniority systems, since they are by definition negotiated and maintained without regard to race. If, on the other hand, this Court agrees with the Ninth Circuit's holding that there is no operational distinction in liability standards between Title VII and Section 1981, bona fide seniority systems will be no more subject to attack under Section 1981 than Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Fourth Circuit Court of Appeals should be denied.

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